MOTION FILED
SEP 10 1969

No. 13

In the

Supreme Court of the United States

OCTOBER TERM, 1969

WILLIAM L. MAXWELL,

Petitioner,

vs.

O. E. BISHOP, Superintendent of Arkansas State Penitentiary,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE AND BRIEF OF AMICI CURIAE

Submitted By

American Friends Service Committee,
Board of Social Ministry, Lutheran Church in America,
Church of the Brethren, General Board,
Council for Christian Social Action of the United Church of Christ,
Department of Church in Society of the Christian Church (Disciples of Christ)
The Executive Council of the Episcopal Church in the United States (Experimental and Specialized Services Section)
General Board of Christian Social Concerns of the United Methodist Church
Greek Orthodox Archdiocese of North and South America,
The American Ethical Union
The United Presbyterian Church in the United States of America by George E. Swearey, Moderator and William P. Thompson, Stated Clerk of the General Assembly.

WILLARD J. LASSERS
ELSON, LASSERS AND WOLFF
(ALEX ELSON, *of counsel*)
11 South La Salle Street
Chicago, Illinois 60603

ELMER GERTZ
120 South La Salle Street
Chicago, Illinois 60603
Attorneys for Amici

The Scheffer Press, Inc.—ANdover 3-6850

INDEX

	PAGE
Motion for Leave To File Brief of Amici Curiae	1
Brief of Amici Curiae	9
1. Imposition of the Death Penalty In a Unitary Trial Is a Deprivation of Life and Liberty Without Due Process	9
Conclusion	13

TABLE OF CASES

Witherspoon v. *Illinois*, 391 US 510 (1968)	12

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 13

WILLIAM L. MAXWELL,

Petitioner,

vs.

O. E. BISHOP, Superintendent of Arkansas State Penitentiary,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE AND BRIEF OF AMICI CURIAE

Submitted By

American Friends Service Committee,
Board of Social Ministry, Lutheran Church in America,
Church of the Brethren, General Board,
Council for Christian Social Action of the United Church of Christ,
Department of Church in Society of the Christian Church (Disciples of Christ)
The Executive Council of the Episcopal Church in the United States (Experimental and Specialized Services Section)
General Board of Christian Social Concerns of the United Methodist Church
Greek Orthodox Archdiocese of North and South America,
The American Ethical Union
The United Presbyterian Church in the United States of America by George E. Sweazey, Moderator and William P. Thompson, Stated Clerk of the General Assembly.

The above religious organizations by their attorneys, Willard Lassers and Elson, Lassers and Wolff, (Alex Elson, of counsel) and Elmer Gertz, move for leave to file a brief *amici curiae* in support of petitioner, William L. Maxwell. In support of this motion the religious organizations represent as follows:

The legal arguments on behalf of petitioner have been ably presented by his counsel. There are, however, a number of ethical considerations of deep concern to the religious organizations. Most of these organizations formally have taken stands in opposition to capital punishment.[1] They are aware that the issue of the death penalty as such is not at bar.

They desire to present a point of view somewhat different from that of petitioner, which they think will contribute to a more complete understanding of the case. Hence ask leave to file this brief.

These organizations have a total membership exceeding 34,580,000. They are:

1. AMERICAN FRIENDS SERVICE COMMITTEE.

The Americans Friends Service Committee, has, since 1917, engaged in religious; charitable, social, philanthropic and relief work on behalf of the several branches and divisions of the Religious Society of Friends in America. There are approximately 123,000 Friends in the United States. The American Friends Service Committee, [illegible]

[1] The statements appear in the appendix to the amicus brief filed on behalf of the American Friends Service Committee, et al, in *Witherspoon* v. *Illinois*, O.T. 1967, No. 1015. Substantially every major denomination has expressed its opposition to the death penalty. The statements appear in the *Witherspoon* brief.

though it cannot speak for all Friends, has a vital interest in this litigation because of Friends' historic and continued opposition to the taking of human life by the State. Such opposition to capital punishment goes back more than 300 years, to the beginning of the Quaker movement and stems from Quaker belief that there is an element of the divine in every man.

2. BOARD OF SOCIAL MINISTRY, LUTHERAN CHURCH IN AMERICA

The Board of Social Ministry is an instrumentality of the Lutheran Church in America. Its object is "to inquire into the nature and proper obedience of the church's ministry within the structures of social life . . . devoting itself in particular to those aspects of the church's ministry in which individual and social needs are met as an expression of Christian responsibility for love and justice."

The 1966 biennial convention of the Lutheran Church in America adopted a social statement on capital punishment encouraging abolition of capital punishment. The Lutheran Church in America has 3,300,000 members in 6,225 congregations in the United States and Canada.

3. CHURCH OF THE BRETHREN GENERAL BOARD

The Church of the Brethren General Board is the administrative arm of the Church of the Brethren. It carries out policies adopted by the church's legislative arm—Annual Conference—in the areas of world ministries, parish ministries and general services. Among its world ministries are efforts to correct social injustices at home and abroad. The Church of the Brethren has adopted

policy statements opposing capital punishment on several occasions, the last one being in 1959 at the Annual Conference. The Church of the Brethren has 200,000 members in approximately 1,000 churches.

4. COUNCIL FOR CHRISTIAN SOCIAL ACTION OF THE UNITED CHURCH OF CHRIST

The Council for Christian Social Action is an instrumentality of the United Church of Christ devoted to promoting education and action in international, political and economic affairs. The Council stated its position in opposition to capital punishment in a policy statement of January 30, 1962. The United Church of Christ has over 10,000,000 adherents.

5. DEPARTMENT OF CHURCH IN SOCIETY OF THE CHRISTIAN CHURCH (DISCIPLES OF CHRIST)

The Department of Church in Society of the Division of Church Life and Work is a part of The United Christian Missionary Society, a national unit of the Christian Church (Disciples of Christ). The Christian Church has approved two resolutions on capital punishment in its International Convention. The first resolution, approved in October 1957 at Cleveland, Ohio, stressed the need for rehabilitation of criminals and indicated that "the practice of capital punishment stands in the way of more creative, redemptive and responsible treatment of crime and criminals. The second, "Concerning Abolition of Capital Punishment," was approved in the October 1962 Assembly of the International Convention at Los Angeles, California. This resolution specifically placed the Christian Church (Disciples of Christ) on record as

"favoring a program of rehabilitation for criminal offenders rather than capital punishment."

The Christian Church (Disciples of Christ) in the United States and Canada has a membership of 1,600,648.

6. THE EXECUTIVE COUNCIL OF THE EPISCOPAL CHURCH IN THE UNITED STATES (EXPERIMENTAL AND SPECIALIZED SERVICE SECTION)

The Executive Council is the principal administrative body of The Domestic and Foreign Missionary Society of The Protestant Episcopal Church in the United States of America which has 7,546 parishes and missions, 11,362 ordained clergy and 3,588,435 baptized members.

7. GENERAL BOARD OF CHRISTIAN SOCIAL CONCERNS OF THE UNITED METHODIST CHURCH

The General Board of Christian Social Concerns is an instrumentality of the United Methodist Church. Its purpose is to further the works of the church in the sphere of social affairs. The United Methodist Church at its 1960 General Conference adopted a statement opposing the death penalty. The statement was revised in 1964 and is now part of United Methodist Social Policy. The United Methodists number 11,000,000 members among their 38,000 churches which are situated in every state.

8. GREEK ORTHODOX ARCHDIOCESE OF NORTH AND SOUTH AMERICA

The Greek Orthodox Church expresses the belief that every person should be afforded every opportunity to establish his innocence. If he is found guilty, he should be

afforded every opportunity to present what evidence he can to mitigate his guilt. The Greek Orthodox Church consists of 500 parishes, largely in the United States and Canada, and some in Central and South America. The membership of the Church is 1,500,000.

9. THE AMERICAN ETHICAL UNION

The American Ethical Union is a federation of the Ethical Culture Societies and Fellowships in the United States, which, collectively constitute a liberal religious humanist fellowship known as the "Ethical Movement" or the "Ethical Culture Movement."

The first Ethical Culture Society was founded in New York City in 1876 by Dr. Felix Adler. There are today 24 Societies and Fellowships of the American Ethical Union in ten states and the District of Columbia. The American Ethical Union is a member of the International Humanist and Ethical Union, a world-wide organization, with headquarters in Utrecht, The Netherlands. Religious humanists oppose the death penalty. The American Ethical Union has adopted policy statements calling for its abolition, and Members and Leaders (Ministers) of Ethical Culture Societies have been active and, in many instances, in the forefront of organized efforts to have the death penalty abolished throughout the United States.

10. THE UNITED PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA BY GEORGE E. SWEAZY, MODERATOR AND WILLIAM P. THOMPSON, STATED CLERK OF THE GENERAL ASSEMBLY

The United Presbyterian Church adopted a statement condemning the death penalty at its 171st general as-

sembly in 1959 and adopted a revised statement at the 177th General Assembly in 1965.

The United Presbyterian Church in the United States of America has a membership of 3,250,000. It has 8,750 churches throughout the nation.

Petitioner has consented to the filing of this brief. Consent has been requested of respondent, but we have not yet received a reply.

Respectfully submitted,

WILLARD J. LASSERS
ELSON, LASSERS & WOLFF
(ALEX ELSON, of counsel)
11 South La Salle Street
Chicago, Illinois 60603

and

ELMER GERTZ
120 South La Salle Street
Chicago, Illinois 60603
Attorneys for Amici.

BRIEF OF AMICI CURIAE

Amici ask this court to hold for petitioner both on the unitary trial issue and on the lack of standards issue. It is the unitary trial issue that appears to raise particularly grave ethical problems, and for that reason these *amici* confine their brief to that issue.

I.

Imposition of the Death Penalty In a Unitary Trial Is a Deprivation of Life and Liberty Without Due Process

The death penalty is the most awful penalty the law can impose. Of all murderers, only a few are selected for the supreme sentence. One would suppose that those so selected are chosen only after the most searching probe into every phase of their lives, their character, their motivation and their personalities. For those who plead guilty and for those who elect a bench trial, the opportunity for such probe is open. But in most states, for the defendant who pleads not-guilty, and elects a jury trial, the door to such probe, realistically, is closed. Because he asserts his innocence, he must yield his opportunity to an effective plea for mercy.

To be sure, the right to present evidence in support of a plea for mercy and a plea itself is preserved—nominally. The accused may both argue his innocence and at one and the same time assert that if his defense is disbelieved, the jury should spare his life. But such a defense surely is self-destructive. The jury of laymen scarcely will appre-

ciate the dilemma of the accused. Hence, the plea for mercy almost surely will be interpreted as a confession of guilt. The evidence of innocence disbelieved may influence the jury to impose the ultimate penalty upon an accused who, they deem, sought to trick them into accepting a false tale. The alternative is during the trial to present nothing, or, at any rate a minimum in support of a plea for mercy. This course means risking all on the plea of innocence. Thus the accused is presented with a cruel dilemma of trial tactics.

But far more is involved than a hard choice of trial strategy. Moral issues are at stake as well. A defendant who asserts his innocence may well decline to plead for mercy, apart from the effect of such plea on his chance of acquittal. The moral man might well find it wrong to plead for mercy for a crime he asserts he did not commit, at least until a judgment of guilt has been passed upon him. Only at such point, having been judged by a fallible human judgment, might a man feel free to ask for the sparing of his life.

For the community, the moral issues are more complex, more profound. Many defendants, perhaps most, will elect to make no plea for mercy, preferring to rely on the plea of innocence. In such case the jury makes its choice, knowing nothing of the defendant as a human being. Yet it is asked to consider the extreme penalty for him.

This, we think, imposes an immoral task upon the jury, wholly apart from the issue of the morality of capital punishment itself.

Since most death sentences are imposed for murder, let us consider this crime.

The Sixth Commandment is "Thou shalt not kill." Every step in the enforcement of this commandment by society is fraught with the greatest difficulties.

A human being is slain by another. To identify the killer often is a subtle, baffling task. Often guilt or innocence as found by a court turns on the question whether the jury believes one man or another; whether the rules of evidence permit or exclude one or another bit of evidence, and similar issues. Having made a decision that the defendant is responsible for the death, then the jury has an even more elusive task. Despite the infinite complexity of human motivation, the crime must be categorized into one of two or three legislatively defined classes, such as "murder", "voluntary manslaughter", etc.

If the jury chooses the label "murder", then it must fix the punishment. Life and death are in its hands. Here, we think, the religious and ethical teachings of our Judaic-Christian heritage have special relevance. Only divine judgments are perfect. God alone can assess truly the measure of a man's culpability. The truth of this ancient teaching has been reaffirmed and reinterpreted for us by modern learning concerning human motivation. Yet, by an accident in the development of the law, a man may be sentenced to death, deprived of an effective opportunity to present evidence in mitigation. The voice of the accused himself is effectively stilled to plead for his own life. Even his counsel cannot make a plea for him, or if he does so, must mute his speech. The jury which dooms a man may know nothing of him as a man, or as a human being. His childhood, his youth, his education, his work, the circumstances leading to the criminal act—the jury knows nothing of, except insofar as they are presented during the guilt-innocence trial. Counsel for petitioner

point out (Pet. Br. 73) that petitioner did not testify. Hence, "The jury who sentenced him to die therefore had heard neither his case for mercy, nor even the sound of his voice." Like Joseph K, in Kafka's *The Trial,* he is sentenced without even reasonable opportunity to submit an initial plea for mercy. Like Joseph K, on the last page of the novel, petitioner might ask, "Were there arguments in his favor that had been overlooked?" The procedure at bar would permit petitioner to perish "like a dog". The "shame of it" is upon us all.

Such procedure is surely prejudicial to the defendant. In addition, and this we stress, it compels the jurors to face an impossible moral dilemma. As jurors they are sworn to decide between life and death. Yet they are deprived, where the defendant pleads innocence, from hearing an effective plea for mercy on his behalf. The life of a man is in their hands; yet they may know almost nothing about that man as a human being. How then can their decision be a moral one? Under the circumstances, it is nearly inevitable that the jury will focus upon the *crime,* and pass judgment upon it, when it should judge the *man* and pass judgment upon him. This, we submit, is profoundly wrong.

In *Witherspoon* v. *Illinois,* 391 US 510 (1968), this Court held it in error to exclude automatically from the jury, those who had scruples against the death penalty.

By the inclusion of such persons on the jury, their moral values, too, come to be reflected in the ultimate decision. The end sought in *Witherpsoon* is to bring to the jury the widest range of public sentiment. But this more perfectly constituted jury, however, can scarcely perform its function satisfactorily, indeed morally, if it is deprived of the fullest knowledge of the man before it.

Once the sentence of death is imposed by a jury, the defendant suffers a prejudice nearly impossible to overcome, even in states such as Illinois where the judge may overrule the jury. Even if evidence in mitigation is presented to a judge, he often rejects the jury recommendation. Reviewing courts, even where empowered to do so, are reluctant to overrule a jury or a judge and jury.

The remedy for the evils of the unitary trial is not complex. The jury need only decide first the guilt or innocence of the accused. If it determines guilt, it may then hear evidence in aggravation and mitigation and fix or recommend the punishment. This procedure is used successfully in a number of states. An alternative is to empanel a separate jury solely for the fixing of the penalty. By either of these methods, the jury, within the limits of human understanding, can make a rational decision on life or death. These methods leave to the jury the sentencing power, but permits its intelligent exercise. Another possibility is to restrict the jury to the guilt-innocence issue, and to vest sentencing in the judge.

Conclusion

The unitary trial in capital cases unfairly prejudices a man on trial for his life and thus constitutes a deprivation of due process of law. It confronts the defendant with a needless moral question—shall he ask for mercy before being judged guilty and while asserting his innocence? It requires the jury to decide the awful question of life or death when frequently deprived of full knowledge of the human being before it.

The unitary trial is a bar to an effective plea by a human being for understanding and for mercy. We plead for the right to make such a plea. As we show compassion, so may we receive compassion. In the words of Amos (5:15) let us "establish judgment in the gate; it may be that the Lord God of hosts will be gracious unto" us. In the words of Micah (6:8), let us strive "to do justly and to love mercy". These words of Scripture encompass our plea.

We ask that the judgment be reversed and that this court find that due process requires the invalidation of the unitary trial in capital cases.

Respectfully submitted,

WILLARD J. LASSERS
ELSON, LASSERS & WOLFF
(ALEX ELSON, of counsel)
11 South La Salle Street
Chicago, Illinois 60603

and

ELMER GERTZ
120 South La Salle Street
Chicago, Illinois 60603
Attorneys for Amici.

September 10, 1969